No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

BARBARA E. BERGMAN
NACDL Amicus
Committee Co-Chair
University of Arizona
James E. Rogers
College of Law
1201 E. Speedway
Tucson, AZ 87521

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and with its affiliates represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the just, proper, and efficient administration of justice. It frequently appears as an amicus curiae before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal defense system as a whole.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Lurking in this case is an important question: whether 18 U.S.C. § 3663A(b)(4) authorizes restitution of the victim's attorneys' fees. The victim's attorneys' fees are usually a large component of the cost of an internal investigation, as in this case. But

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Petitioner has filed a blanket consent to amicus briefs. Respondent has consented to the filing of this brief.

this issue also arises in many contexts other than internal investigations. In recent years, for example, the government has sought restitution under section 3663A(b)(4) for:

- Attorneys' fees incurred by victims in bringing civil suits against the defendant or a person associated with him. *United States v. Elson*, 577 F.3d 713, 727-28 (6th Cir. 2009); *United States v. Edwards*, 19 F. Supp. 3d 366, 373-75 (D. Mass. 2014); *United States v. Nisbet*, 2016 WL 7670849, *2-3 (D. Mont. 2016).

- Attorneys' fees incurred by victims in parallel civil proceedings. *United States v. Skowron*, 529 F. App'x 71, 74-75 (2d Cir. 2013); *United States v. Gupta*, 925 F. Supp. 2d 581, 586 (S.D.N.Y. 2013), *aff'd*, 747 F.3d 111 (2d Cir. 2014).

- Attorneys' fees incurred by victims to "clean up their security." *United States v. Deer*, 2011 WL 2532462, *4 (S.D. Miss. 2011).

- Attorneys' fees incurred by victims for "dealing with the consequences" of the defendant's fraud. *United States v. Okun*, 2009 WL 2365979, *2 (E.D. Va. 2009).

- Attorneys' fees incurred by a victim to "straighten out his finances." *United States v. Gamble*, 2007 WL 1114223, *6 (D. Or. 2007).

Some of these awards of attorneys' fees have been enormous. For instance, in *Gupta*, 925 F. Supp. 2d at 588, the court ordered restitution of $6.2 million in attorneys' fees. *See also Skowron*, 529 F. App'x at 73 (awarding restitution of $3.8 million of the victim's attorneys' fees and costs); *United States v. Amato*, 540 F.3d 153, 158 (2d Cir. 2008) (awarding restitu-

tion of over $3 million of the victim's "attorney fees and accounting costs").

In all these cases, when seeking restitution of the victim's attorneys' fees under section 3663A(b)(4), the government has necessarily relied on the statute's "other expenses" clause. The statute authorizes restitution of "**lost income** and necessary **child care**, **transportation**, and **other expenses** incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4) (emphases added). Attorneys' fees are obviously not "lost income" or expenses for "child care" or "transportation." All that remains in section 3663A(b)(4) is the clause authorizing restitution for "other expenses."

But the "other expenses" clause does not authorize restitution of the victim's attorneys' fees, for two independent reasons.

First, attorneys' fees are nothing at all like child care expenses or transportation expenses. Call it *ejusdem generis* or call it common sense—the statute plainly contemplates that the "other expenses" will be expenses similar to outlays for child care or transportation. These are moderate costs that a victim might incur while leaving home to help with the investigation or prosecution or to testify at trial. A multi-million dollar attorneys' fee bill is completely different in nature and in size.

Second, even if we put aside the references to child care and transportation, the word "expenses" does not include attorneys' fees. When Congress wants to make one person pay another person's at-

torneys' fees, Congress is explicit about it. Indeed, there are other restitution statutes that specifically authorize restitution of the victim's attorneys' fees. The Court has consistently held that statutory authorizations to make one person pay another's "costs" or "compensation" do not encompass attorneys' fees, unless the statute specifically mentions attorneys' fees.

In this case, the disputed restitution award included approximately $2.5 million in attorneys' fees incurred by the victim. This portion of the award, at least, was not authorized by section 3663A(b)(4).[2]

ARGUMENT

Section 3663A(b)(4) does not authorize restitution of the victim's attorneys' fees.

Section 3663A(b)(4) does not authorize restitution of the victim's attorneys' fees, for two independent reasons. First, attorneys' fees are not encompassed within the statutory phrase "other expenses," because they are completely different in nature and in magnitude from the specific listed expenses for child care and transportation. Second, the word "expens-

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[2] This issue is squarely within both parties' wording of the Question Presented. The government's Question Presented is "[w]hether the district court erred in ordering restitution for internal investigation expenses and attorney's fees that were caused by petitioner's fraud offenses." BIO I. Our answer: Yes, at least as to the attorneys' fees. The petitioner's Question Presented is "[w]hether Section 3663(b)(4) covers costs that were 'neither required nor requested' by the government, including costs incurred for the victim's own purposes and unprompted by any official government action." Pet. I. Our answer: No, at least as to the attorneys' fees.

es" does not encompass attorneys' fees, where Congress does not specifically refer to attorneys' fees.

A. The statutory phrase "child care, transportation, and other expenses" does not encompass attorneys' fees, which are completely different in nature and magnitude from expenses for child care and transportation.

Section 3663A(b)(4) authorizes restitution of "child care, transportation, and other expenses." This phrase does not encompass the victim's attorneys' fees, which are nothing like expenses for child care or transportation, either in nature or in magnitude.

When a store advertises "baseballs, footballs, and *other balls*," shoppers know they will not find matzo balls or balls of yarn, despite the phrase "other balls," because they realize that the other balls at the store will be similar to baseballs and footballs. In ordinary speech, everyone understands that "other items" at the end of a list of specific items means other items like the ones in the list. Otherwise there would have been no point in listing specific items.

This common-sense principle, as applied to statutes, is the *ejusdem generis* canon of construction. Under this canon, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Thus where a statute exempts "seamen, railroad employees, or any other class of workers," the "other class of

workers" includes only workers similar to seamen and railroad employees. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Likewise, where a statute applies to "execution, levy, attachment, garnishment, or other legal process," the "'other legal process' should be understood to be process much like the processes of execution, levy, attachment, and garnishment." *Washington Dep't of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 385 (2003).

One purpose of the *ejusdem generis* canon is to give effect to the intent of Congress. "When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012).

A second purpose of the *ejusdem generis* canon is to avoid rendering meaningless the specific examples in the statutory text. *Yates v. United States*, 135 S. Ct. 1074, 1086-87 (2015) (plurality opinion); *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 295 (2011). Where Congress enacts a statute with a sentence in the form "A, B, and other X's," the "other X's" cannot mean *all* other X's without turning "A" and "B" into surplusage. A and B *are* X's, so if Congress had meant *all* other X's, it would have just said "X's" without mentioning A and B. Where a statute says "A, B, and other X's," the other X's thus have to be X's similar to A and B.

Section 3663A(b)(4) authorizes restitution of "child care, transportation, and other expenses." The "other expenses" must be similar in nature to expenses for child care and transportation. That is,

they must be moderate expenses that a person might incur while leaving home to aid the prosecution in investigating and prosecuting the offense.

It is not hard to think of examples:

• The cost of lodging and meals, where the trial is not in the victim's home town. A securities fraud prosecuted in New York, for example, might have victims all over the country. Several federal districts, such as the Districts of Alaska and Nevada, are so large that some victims must travel long distances to testify.

• The cost of caring for a family member who is not a child. Many people are the primary caregivers for a parent, a grandparent, or a disabled relative who cannot be left alone for an extended period of time. While a victim is away from home, he or she may need to hire a professional caregiver.

• The cost of long-distance phone calls. This is less of a concern now, but in 1996, when the statute was enacted, a victim who lived far from the prosecutor's office could run up a substantial phone bill.

These are "other expenses" that are of the same nature and order of magnitude as the specific examples of expenses mentioned in the statute. They are the kind of moderate expenses that any victim might incur while helping the government prepare for trial or while testifying at trial.

Attorneys' fees are nothing at all like expenses for child care and transportation, either in nature or in magnitude. The two categories of expenditure have completely different purposes. Child care and transportation expenses are incidental costs of leaving home to attend trial or to help with the investiga-

tion. Hiring a lawyer, by contrast, is not an incidental cost of leaving home to attend trial or to help the prosecutor. It is a deliberate choice, normally made for one's own benefit rather than to aid the prosecution.

Moreover, expenses for child care and transportation are inherently modest in amount. Attorneys' fees, by contrast, can (as in this case) run into the millions. They are limited only by the number of hours a law firm can bill and the hourly rate the law firm can charge.

The conclusion that attorneys' fees are not encompassed in section 3663A(b)(4)'s reference to "other expenses" is reinforced by the fact that the large-value items of restitution authorized by section 3663A are not in subsection (b)(4). They are in other subsections. These large-value items include the return of lost or damaged property (or compensation, if return is impractical), § 3663A(b)(1); payment for the cost of medical treatment, § 3663A(b)(2)(A), and physical therapy and rehabilitation, § 3663A(b)(2)(B); reimbursement for lost income arising from bodily injury, § 3663A(b)(2)(C); and the cost of funeral and related services, § 3663A(b)(3). It is hardly plausible that Congress would sneak attorneys' fees, which are often much larger than any of these listed items of restitution, into the phrase "child care, transportation, and other expenses."

The statutory phrase "child care, transportation, and other expenses" thus does not include the victim's attorneys' fees. Applying the *ejusdem generis* canon or applying simple common sense, the phrase "other expenses" does not contemplate attorneys'

fees, because attorneys' fees are completely different from child care and transportation expenses.[3]

B. The word "expenses," without any reference to attorneys' fees, does not encompass attorneys' fees.

Section 3663A(b)(4) authorizes restitution of certain of the victim's "expenses." The statute does not refer specifically to attorneys' fees. For this reason, even in the absence of *ejusdem generis*, section 3663A(b)(4) would not authorize restitution of the victim's attorneys' fees.

Because the background rule is that each person pays his or her own attorneys' fees, the Court has held several times that Congress's use of a broad term such as "compensation," "costs," or "expenses," without an express reference to attorneys' fees, does not encompass attorneys' fees. Thus in *Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158, 2162, 2164 (2015), the Court held that a statute authorizing the award of "compensation" for "necessary services" does not authorize the award of attorneys' fees. Likewise, in *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-19 (1994), the Court held that a statute authorizing the award of "necessary costs" does not authorize the award of attorneys' fees. Such "generalized commands," the Court concluded, are not sufficient, without a specific reference to attorneys' fees. *Id.* at 815 (citation omitted). *See also*

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[3] Although our brief focuses on attorneys' fees, the argument in section A applies equally to other professional fees, such as fees for accountants and consultants. These professional fees, like attorneys' fees, are nothing like child care and transportation expenses in nature or magnitude.

Summit Valley Indus., Inc. v. Local 112, United Brotherhood of Carpenters and Joiners, 456 U.S. 717, 722 (1982) ("Ordinarily a statutory right to 'damages' does not include an implicit authorization to award attorney's fees."); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (statute authorizing "costs" does not authorize attorneys' fees).

By contrast, for a general term like "expenses" or "costs" to encompass attorneys' fees, the statute must explicitly include attorneys' fees in the definition of that general term. *See, e.g.*, *Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014) (interpreting Bankruptcy Code provisions which specifically define "administrative expense" to include attorneys' fees); *Arlington Central School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006) (interpreting the IDEA, which authorizes the court to "award reasonable attorneys' fees as part of the costs"); *Marek v. Chesny*, 473 U.S. 1, 8-9 (1985) (noting that the term "costs" includes attorneys' fees only where Congress has expressly so provided).

Section 3663A(b)(4)'s failure to mention attorneys' fees is particularly telling, because other restitution statutes *do* specifically authorize restitution of the victim's attorneys' fees. For instance, under the restitution statute applicable to sexual abuse offenses, the court is expressly authorized to include the victim's "attorneys' fees" in the restitution award. 18 U.S.C. § 2248(b)(3)(E). Congress also specifically authorized restitution of the victim's attorneys' fees in the statute applicable to offenses involving the sexual exploitation of children, *id.* § 2259(b)(3)(E), and in the statute applicable to offenses involving domestic violence and stalking, *id.* § 2264(b)(3)(E). Congress

included no such provision in section 3663A(b)(4). When Congress wants to make the defendant pay the victim's attorneys' fees as part of the restitution, Congress says so specifically. Congress does not hide the attorneys' fees in a general phrase like "other expenses."

There are also several provisions of Title 18 that—unlike section 3663A(b)(4)—expressly require the defendant to pay the victim's attorneys' fees where the victim brings a civil suit against the defendant to recover for injuries arising from the offense. *See* 18 U.S.C. § 1964(c) (requiring the defendant to pay the victim's attorneys' fees in civil suits arising from RICO violations); *id.* § 2255(a) (requiring the defendant to pay the victim's attorneys' fees in civil suits arising from offenses involving the sexual exploitation of children); *id.* § 2333(a) (requiring the defendant to pay the victim's attorneys' fees in civil suits arising from offenses involving terrorism). Congress included no such requirement in section 3663A(b)(4). Again, when Congress wants the defendant to pay the victim's attorneys' fees, Congress refers specifically to attorneys' fees, not generally to "expenses."

Indeed, in all contexts—not just criminal cases—where Congress wants one person to pay another's attorneys' fees, Congress says so explicitly. *See, e.g.*, 7 U.S.C. § 210(f) ("If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee."); *id.* § 499g(b) (same); 15 U.S.C. § 15(a) (allowing the plaintiff to recover "a reasonable attorney's fee"); *id.* § 1117(a) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."); 17 U.S.C. § 505 ("the court may also award a reasonable attorney's fee to the prevailing party"); 28

U.S.C. § 2412(b) ("a court may award reasonable fees and expenses of attorneys"); 29 U.S.C. § 107 (authorizing the award of "a reasonable attorney's fee"); *id.* § 216(b) (same); 33 U.S.C. § 928(a) (same); 35 U.S.C. § 285 ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."); 42 U.S.C. § 1988(b) (authorizing the award of "a reasonable attorney's fee"); *id.* § 2000a-3(b) (same); *id.* § 3613(c)(2) (same); 47 U.S.C. § 206 (authorizing the award of "a reasonable counsel or attorney's fee"); 54 U.S.C. § 307105 ("the court may award attorney's fees").

Where Congress wants one person to pay another's expenses *and* attorneys' fees, Congress explicitly refers to both. Congress does *not* assume or intend that the word "expenses," by itself, includes attorneys' fees. *See, e.g.*, 2 U.S.C. § 396 (authorizing award of "reasonable expenses ... including reasonable attorneys fees"); 5 U.S.C. § 504(a)(1) (authorizing award of "fees and other expenses"); 12 U.S.C. § 2273 (authorizing award of "reasonable expenses and attorneys' fees"); *id.* § 4246 (authorizing award of "reasonable attorney's fees and other expenses of litigation"); *id.* § 4588(d) (authorizing award of "reasonable expenses and attorneys fees"); *id.* § 5005(b)(1) (authorizing award of "reasonable attorney's fees and other expenses"); 28 U.S.C. § 361 (authorizing award of "reasonable expenses, including attorneys' fees"); *id.* § 1447(c) (authorizing award of "actual expenses, including attorney fees"); *id.* § 1875(d)(2) (authorizing award of "attorney fees and expenses"); *id.* § 1927 (authorizing award of "costs, expenses, and attorneys' fees"); 29 U.S.C. § 1370(e)(1) (authorizing award of "costs and expenses ... including rea-

sonable attorney's fees"); 30 U.S.C. § 938(c) (authorizing award of "all costs and expenses (including the attorney's fees)"); 31 U.S.C. § 3730(d)(1) (authorizing the award of "expenses ... plus reasonable attorneys' fees and costs"); 38 U.S.C. § 4323(h)(2) (authorizing the award of "reasonable attorney fees, expert witness fees, and other litigation expenses"); 42 U.S.C. § 4654(a) (authorizing the award of "expenses, including reasonable attorney, appraisal, and engineering fees"); 52 U.S.C. § 10310(e) (authorizing the award of "a reasonable attorney's fee ... and other reasonable litigation expenses").

If the word "expenses," by itself, were enough to authorize the award of attorneys' fees, the specific mention of attorneys' fees in all these statutes would be redundant.

Unlike all these statutes, section 3663A(b)(4) refers only to "expenses," not to attorneys' fees. It therefore does not authorize the restitution of the victim's attorneys' fees. Congress knows how to make one person pay another's attorneys' fees, but Congress did not include such a provision in section 3663A(b)(4).

CONCLUSION

The judgment below should be reversed, at least to the extent it includes the victim's attorneys' fees and similar professional fees.

Respectfully submitted,

BARBARA E. BERGMAN
NACDL Amicus
Committee Co-Chair
University of Arizona
James E. Rogers
College of Law
1201 E. Speedway
Tucson, AZ 87521

STUART BANNER
Counsel of Record
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu